Filed 10/19/04 Talent Tree v. WCAB CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TALENT TREE, INC, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and TAMMY WALERSTEIN, Respondents.	No. B174980 (W.C.A.B. No. VNO 0454696)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled.

Bolden & Martin, Monique R. Pride, and Areva Martin for Petitioner.

Malter Law Corporation and Mark M. Malter for Respondent Rostam Gabri.

No appearance on behalf of Respondent Workers' Compensation Appeals Board.

Talent Tree, Inc., a temporary employment agency, seeks review of an order of the Workers' Compensation Appeals Board reversing the decision of the workers' compensation judge and issuing an award in favor of its employee Tammy Walerstein. The Board concluded that Walerstein's injury arising out of a motor vehicle collision during her evening commute home from a temporary work assignment was not barred by the going and coming rule. The Board found that the injury, which took place after Walerstein had stopped at the Talent Tree office to deposit her time card in a drop box, occurred while Walerstein was engaged in a special mission for Talent Tree. We conclude that Walerstein's injury is not compensable under the special mission exception to the going and coming rule, because the deposit of the time card in the drop box at the Talent Tree office provided no benefit to Talent Tree. We annul the Board's order.

FACTS

On May 8, 2002, Walerstein was hired by Talent Tree, a temporary employment agency with an office in Tarzana. Walerstein lived in Tarzana approximately two miles from Talent Tree's Tarzana office. Walerstein was hired to work on a temporary basis for outside companies that were clients of Talent Tree.

Talent Tree employees are paid in the following manner. An employee receives a folder with time cards. Paychecks are processed on a weekly basis. The employee is to complete the time card and have it signed by the supervisor at the temporary work assignment. The employee then has two options for submission of the time card to Talent Tree. One option is to mail the time card to Talent Tree's payroll office in Brea on Friday at the end of the work week. The employee is provided self-addressed envelopes for this purpose. The time card must be received in the Brea payroll office by the following Tuesday afternoon. The second option is to deposit the time card in a drop box at the Tarzana office by noon on the following Monday. Talent Tree messengers these time cards to the Brea payroll office on Monday afternoon. The employee chooses the method of submission of the time card. Assuming the United States Postal Service timely delivers the mail, both options result in the preparation of a paycheck at the same time.

Paychecks are prepared on Wednesday and are available Thursday night or Friday. Time cards received in the Brea payroll office later than Tuesday afternoon are processed the following week.

This procedure was explained to Walerstein at the time she was hired. Walerstein understood, however, that she would get her paycheck sooner if she deposited the time card in the drop box. She was told that if she was concerned about the vagaries of the United States Postal Service, she should deposit her time card in the box.

Walerstein was assigned to work at Blue Shield in Canoga Park. The Blue Shield office is located approximately five miles from Talent Tree's Tarzana office. Walerstein worked at Blue Shield from 8:00 a.m. to 5:00 p.m. on Thursday, May 9, 2002. She drove her own vehicle to and from her home and the Blue Shield office. She was not compensated for her commute time, nor reimbursed for the costs of the commute. Walerstein worked the same shift on Friday, May 10, 2002. Once again, she drove her own vehicle from home to the Blue Shield office. She obtained the signature of the Blue Shield supervisor on her time card. On her way home from the Blue Shield office driving her own vehicle, she stopped at Talent Tree's Tarzana office and deposited her time card in the drop box. She continued on her way home, but was involved in a motor vehicle collision between the office and home. She was injured.

PROCEDURAL BACKGROUND

Walerstein filed a claim with Talent Tree for a workers' compensation award. After a hearing, the workers' compensation judge found that Walerstein's claim was barred by the going and coming rule, because the trip to the drop box was a personal errand. Walerstein petitioned for reconsideration. The Board granted the petition and reversed the determination of the workers' compensation judge. The Board concluded that the trip to the drop box was a reasonable expectancy of the employment because Walerstein had been encouraged to use the drop box and Talent Tree was benefited by the maintaining of good employee relations flowing from the timely payment of its employees. Talent Tree petitioned this court for review of that decision.

DISCUSSION

Standard of Review

The Board decides questions of fact using a preponderance of the evidence standard, placing the burden of proof on the employee. (Lab. Code, § 3202.5.) We review the Board's factual findings for substantial evidence. (*Levesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 637.) The provisions of the workers' compensation law are to "be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, § 3202.)

Going and Coming Rule

Liability for workers' compensation accrues for an injury "arising out of and in the course of the employment." (Lab. Code, § 3600, subd. (a).) Generally, liability begins and ends at the employer's workplace. In the absence of exceptional circumstances, an employee is not entitled to be compensated for injuries while "going and coming" to and from the place of employment, because the employee is not providing any benefit to the employer, nor is the employee under the control of the employer during the commute. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 345, 351-352; *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157.) "The rule provides that an injury suffered 'during a local commute enroute to a fixed place of business at fixed hours in the absence of special or extraordinary circumstances' is not within the course of employment. As such, it is not compensable. [Citation.]" (*Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 564-565.) The going and coming rule is applicable to employees of temporary employment agencies, who are sent by the agencies from their homes "to various businesses to perform services for which compensation [is] paid to [the agency], who, in turn, [pays the employee] for the services he performed on [the agency's] behalf." (*Henderson v. Adia Services, Inc*. (1986) 182 Cal.App.3d 1069, 1076-1078.)

Special Mission

The going and coming rule is subject to many judicially created exceptions. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd., supra*, 40 Cal.3d at pp. 351-352.) One such exception is when the injury occurs while the employee is on a special mission for the employer. To establish a special mission, the employee must prove: (1) the activity is special, that is, extraordinary, in relation to the employee's routine duties; (2) the activity is within the course of the employee's employment; and (3) the activity was taken at the express or implied request of the employer and for the employer's benefit. (*Schreifer v. Industrial Acc. Com*. (1964) 61 Cal.2d 289; *C. L. Pharris Sand & Gravel, Inc. v. Workers' Comp. Appeals Bd*. (1982) 138 Cal.App.3d 584, 590.) The special activity need not be required by the employer as a condition to employment and need not be compulsory, but the mission must incidentally or indirectly contribute to the service and benefit of the employer. (*Dimmig v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 860, 867.)

Injuries sustained during special missions have been found compensable under the following circumstances: (1) the employee is required to work special hours (*Schreifer v. Industrial Acc. Com., supra*, 61 Cal.2d at p. 294); (2) the employee is required to work at multiple job sites (*Hinojosa v. Workmen's Comp. Appeals Bd., supra*, 8 Cal.3d at p. 160); (3) the employee's vehicle is required for work (*Smith v. Workmen's Comp. App. Bd*. (1968) 69 Cal.2d 814, 820); (4) the employee is traveling to a special event, training course, or union activity (*Dimmig v. Workmen's Comp. Appeals Bd., supra*, 6 Cal.3d at p. 869; *Shell Oil Co. v. Industrial Acc. Com*. (1962) 199 Cal.App.2d 426, 431; *Perez v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 60, 64); (5) the employee is requested to carry a special tool to and from work (*Sun Indem. Co. v. Industrial Acc. Com.* (1926) 76 Cal.App. 165, 167; cf. *Eby v. Industrial Acc. Com*. (1925) 75 Cal.App. 280, 282; *Wilson v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 181, 185); and (6) the employee, a police officer, is required to wear a uniform and render aid during the commute (*Garzoli v. Workmen's Comp. App. Bd*. (1970) 2 Cal.3d 502, 506).

A mission is not special unless it is extraordinary or unusual. (*Baroid v. Workers' Comp. Appeals Bd*. (1981) 121 Cal.App.3d 558, 562.) The following activities have been found to be not special: (1) an early commute to work arranged by the employer (*Luna v. Workers' Comp. Appeals Bd*. (1988) 199 Cal.App.3d 77, 83); (2) commuting twice a day for a split shift (*Arboleda v. Workmen's Comp. App. Bd*. (1967) 253 Cal.App.2d 481, 486); and (3) travel to a courthouse by a police officer to testify (*City of San Diego v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1385, 1388).

We are aware of no cases concerning the submission of time cards by employees of temporary employment agencies. However, several cases have been concerned with the analogous issue of an employee picking up a paycheck. An employee has been found to have a compensable injury where the employee is injured while traveling to pick up a paycheck at a time and location specified by the employer. (*Argonaut Ins. Co. v. Industrial Acc. Com.* (1963) 221 Cal.App.2d 140, 147-149; *Bethlehem Steel Co. v. Ind. Acc. Com*. (1945) 70 Cal.App.2d 382, 387-388 [United States Savings Bond purchased through payroll deductions]; *Pacific Indem. Co. v. Ind. Acc. Com.* (1945) 26 Cal.2d 509, 513-515; see also *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd*. (1979) 23 Cal.3d 158, 166-167 [work release from physician to be submitted to employer prior to return to work].) On the other hand, workers' compensation law is not applicable where the employee is injured while picking up a paycheck at a place or time solely within the employee's discretion and for the employee's convenience. (*Robbins v. Yellow Cab Co.* (1948) 85 Cal.App.2d 811, 813-814; *Hinkle v. Workers' Comp. Appeals Bd*. (1985) 175 Cal.App.3d 587, 590-592; *Munyon v. Ole's Inc*. (1982) 136 Cal.App.3d 697, 706; *Fireman's F. Indem. Co. v. Indus. Acc. Com*. (1932) 123 Cal.App. 142, 146-147.)[1]

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[1] We recognize that some of the cases we rely on are not workers' compensation cases, but tort cases. "'In the "going and coming" cases, the California courts often cite tort and workers' compensation cases interchangeably. As Mr. Witkin points out, however, "This practice has been questioned, for compensation rules were developed from a distinct social philosophy, with fault eliminated as a test, and liberal construction of the act required." [Citation.]' [Citations.]" (*Henderson v. Adia Services, Inc., supra,* 182 Cal.App.3d pp. 1077-

In *Robbins v. Yellow Cab Co., supra,* 85 Cal.App.2d 811, an employee went to her employer's premises hours before she was scheduled to work in order to pick up her and her husband's paychecks. She could have received her paycheck later when she reported for work. She was injured on the employer's premises while performing this task. She sued her employer for negligence. The employer raised the exclusive jurisdiction of the workers' compensation law as a defense. The appellate court held that the employee had been engaged in an activity unrelated to her employment and that the employer's liberal policy of allowing employees to pick up their paychecks early was for the employees' convenience and not the employer's. Thus, liability for the injury was not barred by the exclusive jurisdiction of the workers' compensation law.

In *Hinkle v. Workers' Comp. Appeals Bd., supra,* 175 Cal.App.3d 587, the employee had arranged for his convenience for the employer to mail his paycheck to a post office box near his bank. The employee was injured at lunch while driving to the post office and the bank to pick up and deposit his paycheck. The appellate court held that the injury was not compensable because the employee was, for his own convenience, picking up his paycheck at a time and place specified by the employee and not the employer. (*Id*. at p. 592.)

In *Munyon v. Ole's Inc., supra,* 136 Cal.App.3d 697, a third party was injured in a motor vehicle collision with a motor vehicle driven by an employee of Ole's. The third party sued Ole's under the doctrine of respondeat superior. The employee had been traveling to Ole's on her day off to voluntarily pick up her paycheck. The appellate court held that the employee was not on a special mission and the employer was not liable for the third party's injuries under the doctrine of respondeat superior. (*Id*. at pp. 703-706.)

In *Fireman's F. Indem. Co. v. Indus. Acc. Com., supra*, 123 Cal.App. 142, a temporary railroad construction employee quit his job and traveled in a private car to the office to pick up his paycheck. He was injured. The appellate court held the injury was not compensable,

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1078.) Nevertheless, the California Supreme Court has recognized that the two tests are closely related, though not identical. (*Id.* at p. 1078.)

because picking up a paycheck is a personal errand and the employee was no longer employed by the employer. (*Id*. at p. 147.)

Application of the Law to the Facts of this Case

The workers' compensation judge found that there was no evidence that the drop box for time cards created any benefit for the employer, but was solely for the personal convenience of the employees. The Board disagreed, finding "that use of the drop box was a benefit to the employer inasmuch as the employer was able to pay its employees in a timely fashion, thereby maintaining good employee relations." The cases relied on by the Board for this inference are cases involving the "personal comfort rule," where the employee engages in some activity for the employee's personal comfort during working hours and while being compensated for the time. (*State Comp. Ins. Fund v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 925, 928 [swimming on company time tolerated]; *Toohey v. Workmen's Comp. Appeals Bd*. (1973) 32 Cal.App.3d 98, 101-102 [leaving the employer's premises to pick up lunch during paid break].) No such inference of benefit is sufficient under the special mission exception to the going and coming rule, because all commutes to work benefit the employer indirectly, i.e., the employee shows up for work. (Cf. *Price v. Workers' Comp. Appeals Bd., supra,* 37 Cal.3d at pp. 565-566 [going and coming rule inapplicable to employee who has arrived at work and is waiting for doors to be opened to begin work early; special risk exception not at issue].)

We conclude substantial evidence does not support the Board's finding of a benefit to Talent Tree arising out of Walerstein's use of the drop box. The evidence is undisputed that the employees were given two options to submit a time card. The employees were given self-addressed envelopes to facilitate the mail option and a drop box to facilitate the personal delivery option. The drop box required Talent Tree to pay for a messenger to hand deliver the time cards in the drop box to the Brea payroll office. The mail option obviated the administrative and delivery cost of the personal delivery option. Regardless of which submission option the employee selected, the paycheck would be ready at the same time.

There is no evidence that any paychecks were in fact delayed by the timely use of the United States mail. There is only a suggestion of a possibility of delay. There is no evidence that receipt of the time cards affected the timing of billing of clients. That Walerstein believed she would be paid more promptly if she used the drop box does not create a benefit to Talent Tree. She was not required to deposit the time card at the office, but did so for her own personal convenience.

Walerstein was not paid for the travel time to personally deliver the time card and she was not reimbursed for her travel expenses. She was not required to have a car for work and she did not carry any special tools. Submission of a time card was an ordinary, and not extraordinary, part of her work for a temporary employment agency. The commute was after a regular shift. There was no business purpose for her commute. Walerstein was not on duty nor on Talent Tree's premises. She had dropped off the time card and was on her way home. Accordingly, Walerstein's injury is not compensable under the going and coming rule and her commute does not fall within the special mission exception to the rule.

DISPOSITION

The Board's order is annulled.

NOT TO BE PUBLISHED.

GRIGNON, Acting P. J.

I concur:

ARMSTRONG, J.

MOSK, J., Dissenting

I dissent.

Justice Tobriner noted in *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 156 (*Hinojosa*) that the going and coming rule had had a "tortuous history." "The going and coming rule, which appears simple on its face has been difficult in practice to apply. Charitably Justice Grodin has referred to it as a 'slippery concept.'" (*Parks v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 585, 589.)

Justice Tobriner referred to the "interest of the employee [lying] in his desire to be protected from loss by injury or death that occurs in the non-routine transit, or results from the means of transit or the use of a car undertaken for the employer for his benefit at his direct or *implied* request." (*Hinojosa*, *supra*, 8 Cal.3d at p. 157, italics added.) Thus, "'exceptions will be made to the "going and coming" rule where the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.'" (*Id*. at p. 158.) One respected authority has said that "having shown that years of case law have eroded the rule, courts usually explain why the particular facts of the case come within an established exception to the rule." (1 Hanna, Cal. Law of Employee Injuries & Workers' Comp. (2003 rev.) § 4.150(2), p.4-166 (Hanna).) In short, "'the exceptions have swallowed the rule.'" (*Id.* at p. 4-167.)

In determining the application of the going and coming rule, courts must take into account the mandate of Labor Code section 3202, which specifies that the provisions of

the Workers' Compensation Act "be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Accordingly, "any reasonable doubt as to the applicability of the going and coming doctrine must be resolved in the employee's favor." (*Hinojosa*, *supra*, 8 Cal.3d at pp. 155-156.)

The Worker' Compensation Appeals Board concluded that respondent Tammy Walerstein should recover and was not barred by the going and coming rule. The Board concluded that "(1) applicant's injury, which occurred after depositing her time cards in a special drop-box furnished by her employer, arose out of and occurred in the course of her employment, because it was reasonably contemplated by her employment that she would physically deposit her time sheets, rather than mail her time cards to her employer, and (2) applicant's injury falls under the special mission exception to the going and coming rule."

There is substantial evidence that supports the Board's conclusion. When Ms. Walerstein was hired, she was told about the drop box that was intended solely for time cards. She repeatedly dropped her time cards into the drop box on Fridays and did so for other employees. Using the drop box insured that she would receive her paycheck in a timely fashion. Management instructed the employees about the location of the drop box and 60 to 65 percent of the working force used the drop box to deposit their time cards.

According to the Board, the employer "encouraged applicant to personally deliver her time cards to Talent Tree's [employer's] local office in Tarzana to facilitate timely payment of her wages. Thus, this act was reasonably contemplated as part of the

employment contract." The Board also concluded that "the use of the drop box was a benefit to the employer inasmuch as the employer was able to pay its employees in a timely fashion, thereby maintaining good employee relations." It also stands to reason that prompt receipt of time cards benefits the employer for administrative reasons and to obtain prompt payment from the customers. Moreover, the employer was spared the expense of paying someone to pick up the time cards. Thus, there was at least an "incidental benefit to the employer, not common to commute trips by ordinary members of the work force." (Hanna, *supra*, § 4.151(2), p. 4-169.)

Turning in a time card is different from picking up a paycheck. The time card, unlike the paycheck, is a business tool for the benefit of the employer. It is proof that the employee has worked certain hours. This shows that the employee is entitled to certain compensation under the terms of the contract and gives the employer evidence of that to which it is entitled from the employee. Indeed even picking up paychecks has in certain instances been covered by the Workers' Compensation Act. (See *Mono County Sheriff's Department v. Workers Comp. Appeals Bd.* (1992) 57 Cal. Comp. Cases 731 (writ den.) [picking up check when off duty, which was encouraged by employer]; *Argonaut Ins. Co. v. Industrial Acc. Com.* (1963) 221 Cal.App.2d 140 [picking up paycheck after termination could reasonably be contemplated and anticipated and incidental to employment relationship]; Hanna, *supra*, § 4.131[1][2][3], pp. 4-135 – 4-137.)

Turning the time card into the agency rather than mailing it, must be viewed in the light most favorable to coverage. The employer permitted the choice, when it could have limited its potential liability by requiring mailing only.

Because the injury occurred after Ms. Walerstein left the premises, the special mission exception to the going and coming rule permits the entire trip to be considered covered. As this injury did occur during a special mission however, the personal comfort or personal convenience doctrine also supports recovery. (See *Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 568; *Hanna, supra,* § 4.138[3], pp. 4-156-4-159; § 4.157[3], pp. 4-190-4-191.) Although normally applied to injuries incurred during acts of personal comfort while on the premises or in extended premises factual situations, such as the parking lot, "[i]njuries on premises owned or controlled by the employer," is not the "*sine qua non* for compensation." (*Lewis v. Workers' Compensation Appeals Board* (1975) 15 Cal.3d 559, 562; *Price v. Workers' Comp. Appeals Bd., supra,* 37 Cal.3d at p. 566 [personal comfort doctrine applied when worker injured while changing oil in his car parked on street in front of the employment while awaiting office opening].) "'In determining whether a particular act is reasonably contemplated by the employment, the nature of the act, the nature of the employment, the custom and usage of a particular employment, the terms of the contract of employment, and perhaps other factors should be considered. Any reasonable doubt as to whether the act is contemplated by the employment, in view of this state's policy of liberal construction in favor of the employee, should be resolved in favor of the employee.' (*Employers' Etc. Corp. v. Industrial Acc. Com*. (1940) 37 Cal.App.2d 567, 573-574 99 P.2d 1089].)" (*North American Rockwell Corp. v. Workmen's Comp. App. Bd.* (1970) 9 Cal.App.3d, 154, 158 (*North American*).)

After discussing various scenarios that have been held to be covered by the personal comfort doctrine, such as farm workers swimming on a rest period in a nearby canal, retrieving an overcoat from a burned building, removing a child from the path of an automobile, or playing catch during a break, the *North American* court found compensable an injury sustained by an employee who was injured while helping repair the car of another employee while in the parking lot. The court commented, "Whether a particular activity be classified by the term's response to an emergency, rescue, personal comfort or convenience, recreation, exercise, courtesy, or common decency, the point is that the activity was reasonably to be contemplated because of its general nature as a normal human response in a particular situation *or in some cases because of its being recognized as an acceptable practice in the particular place by custom*. Human services cannot be employed without taking the whole package. In our view a contract which contemplates the use of a parking area on the premises where employees and automobiles gather must necessarily envision that on occasion an automobile will not function and that employees in the vicinity will go to the aid of the one who has trouble." (*North American*, *supra*, 9 Cal.App.3d at p. 159, italics added.) That employees will make special trips to turn in a time card at the agency was an accepted practice by custom and reasonably to be anticipated by the employer. The personal comfort doctrine benefits the employer in the goodwill or increased productivity engendered from extending the courtesy of the personal comfort, commonly understood in scenarios such as permission to use a restroom or take a break. Here too, permission to turn in the time card at the

employer's location is a consideration of personal proclivities and would, of course, encourage good will.

Because the injury occurred after leaving the employer's premises, the majority suggest that Walerstein had reentered the commute. This was, however, not an ordinary commute from a fixed place of business, and the detour was not simply a personal errand. The detour from the ordinary commute to turn in the time card was a special trip for a business purpose in addition to her ordinary duties at the location to which she had been assigned. Therefore, even though Walerstein had left the premises when the injury occurred, the entire trip was covered as a special mission, and the injury was covered by workers' compensation. I would therefore deny the writ and not annul the Board's order.

MOSK, J.